2016 IL App (5th) 150324WC-U

NO. 5-15-0324WC

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

JAMIE HEAD,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	White County.
	)	
v.	)	No. 14-MR-24
	)	
THE ILLINOIS WORKERS'	)	Honorable
COMPENSATION COMMISSION *et al.*	)	T. Scott Webb,
(White County Coal, Appellee).	)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.

Presiding Justice Holdridge and Justices Hoffman, Hudson, and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The Commission's denial of a permanent partial disability award based on a wage differential is against the manifest weight of the evidence; its denial of vocational rehabilitation and maintenance benefits is against the manifest weight of the evidence; but its denial of penalties and attorney fees is not against the manifest weight of the evidence.

¶ 2 This is the second time the Commission's decision in this case has been before us on appeal. During the first appeal, we remanded the claim to the Illinois Workers' Compensation Commission (Commission) for further findings related to the issue of whether the claimant was entitled to a permanent partial disability (PPD) award based on

a wage differential rather than based on a percentage of the person as a whole. The case is now before us on review of the Commission's decision on remand.

¶ 3 The claimant, Jamie Head, worked as a coal miner for the employer, White County Coal. He suffered a work-related injury to his right leg on October 13, 2006, and filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2006)). Following a hearing on April 13, 2011, an arbitrator awarded him PPD benefits based on a wage differential in the amount of $355.46 per week beginning April 13, 2011, pursuant to section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2006)). The arbitrator also awarded maintenance benefits and ordered the employer to pay for the services of a vocational rehabilitation counselor the claimant had retained for job search assistance. Finally, the arbitrator determined that the employer had unreasonably and vexatiously delayed payment of benefits and awarded penalties and attorney fees pursuant to sections 16, 19(k), and 19(*l*) of the Act (820 ILCS 305/16, 19(k), 19(*l*) (West 2006)).

¶ 4 On review, the Commission affirmed and adopted the arbitrator's finding that the claimant cannot return to his previous occupation as a coal miner. The Commission, however, vacated the wage-differential award and awarded the claimant PPD benefits based on a 17.5% loss of the person as a whole pursuant to section 8(d)(2) of the Act (820 ILCS 305/8(d)(2) (West 2006)). The Commission also found that the claimant had reached maximum medical improvement (MMI) on November 10, 2009. Therefore, it awarded him temporary total disability (TTD) benefits up to that date and vacated the arbitrator's award of any additional maintenance benefits beyond that date. The

Commission also vacated the arbitrator's award of vocational rehabilitation expenses and the award of penalties and attorney fees, finding that there was a reasonable dispute based upon medical opinions as to the nature and extent of the claimant's injuries.

¶ 5 The claimant sought judicial review, and the circuit court confirmed the Commission's decision. The claimant then appealed the circuit court's judgment. We vacated the circuit court's judgment confirming the Commission's decision, vacated the Commission's decision, and remanded for further proceedings before the Commission. We held that the Commission's findings of fact and law with respect to its PPD award were insufficient to allow us to review its decision denying the claimant's request for a wage-differential PPD award and, instead, awarding PPD benefits based on a percentage of the person as a whole.

¶ 6 On November 7, 2014, the Commission issued its decision on remand. The Commission made additional findings with respect to the PPD award and reinstated its previous decision by incorporating its findings of fact and law in its prior decision into its decision on remand. The claimant sought review of the Commission's decision on remand before the circuit court, and the court entered a judgment confirming the Commission's decision. The claimant now appeals the circuit court's judgment.

¶ 7 BACKGROUND

¶ 8 The claimant's injury occurred on October 13, 2006, when a cable malfunctioned and trapped his right leg against a piece of heavy machinery. He was taken to a hospital and diagnosed with an acute crush injury to his right leg. An examination revealed

substantial swelling of the right calf but no bone fractures. He was discharged from the hospital the following day.

¶ 9 On October 16, 2006, the claimant saw his primary care physician, who referred him to an orthopedic surgeon, Dr. Jean Houle. Dr. Houle examined him on October 18, 2006. Dr. Houle's examination notes indicated bruising and abrasions to the right lower leg but no swelling or atrophy. X-rays were negative for factures. Dr. Houle prescribed aspirin, pain medication, and the use of crutches as needed. The claimant returned for a follow-up examination one month later, and the doctor observed that the right leg was swollen. The claimant reported that his leg would swell after standing for any prolonged period. Dr. Houle ordered him to remain off work and prescribed physical therapy.

¶ 10 In a follow-up visit with Dr. Houle on February 19, 2007, the claimant reported right leg pain and swelling if he remained on his feet for three or more hours. He told the doctor that he shoveled snow over that weekend and that his leg became swollen and uncomfortable. On October 11, 2007, the claimant reported that his leg would swell when he was active. Dr. Houle's examination revealed that the claimant's right calf was 2.5 to 3 centimeters bigger than his left calf. Dr. Houle released the claimant as having attained MMI on October 11, 2007.

¶ 11 Dr. Houle testified at the arbitration hearing by way of two evidence depositions. During his first deposition, he testified that the claimant had suffered significant swelling secondary to the crush injury. He explained that there was swelling in the claimant's leg because "he can't push the blood back up to his heart as efficiently because the leg's been crushed." The veins have valves that help push blood back to the heart. He stated that

when they are crushed, the valves become incompetent, the blood stays in the veins, and there is seepage of fluid through the veins into the soft tissues of the leg. He testified that the swelling was secondary to the crush injury and that the claimant needed to elevate his leg in order to push the blood back to the heart. He prescribed a Jobst stocking, but the claimant reported no distinct improvement while using the stocking.

¶ 12 Dr. Houle opined that the claimant had permanent restrictions that limited him to being able to stand or walk for no more than two hours at a time without being able to rest and elevate his right leg for 45 minutes. Dr. Houle's restrictions for the claimant also included no crawling, squatting, or climbing. He opined that the claimant was unable to return to his former position as a coal miner. His diagnosis was a crush injury to the leg with resulting chronic lower leg edema. He testified that, when the claimant's leg swells, it places pressure on the nerve, causing numbness in the toes and foot.

¶ 13 During his second deposition, Dr. Houle opined that the claimant would have to find a job where he would not have to stand more than two hours at a time, which "would probably be more in the light duty type work than the moderate duty." He testified that since his prior deposition, he had viewed a surveillance video of the claimant "riding an ATV around his property." He stated that the video also showed the claimant purchasing or picking up the ATV, going to McDonald's, and standing around talking to people. The video showed the claimant climbing into the back of a pickup truck to get to the ATV and then back down off the truck. He testified that he did not see the claimant "hop" off the truck. Although the claimant was riding his ATV at "a pretty good speed," the doctor stated that he did not think that the activity put a lot of stress on the claimant's leg

"because he's basically just turning that thing going in a circle." The doctor added, "He wasn't standing on it or hiking on it, he was just sitting." Dr. Houle did not see "a whole lot of trouble sitting down and riding an ATV"; it was not beyond his restrictions. The doctor also testified that he had no problem with the claimant hunting from the ATV if he is "not doing too much of it."

¶ 14 Dr. Houle testified that he did not see anything in the video that was inconsistent with his work restrictions and that the video did not alter his diagnosis or medical conclusions regarding the work injuries. The doctor explained that the claimant's biggest limitation was being unable to stand for a prolonged period of time. He testified, "we established two hours according to what he told us he is able to stand before the swelling is significant." Dr. Houle testified that a functional capacity examination (FCE) that measured the claimant's ability to stand for two hours "would be useful to see what he could establish as his permanent restrictions," but the doctor was unsure if they could have the claimant do something for over two hours.

¶ 15 On August 29, 2007, at the employer's request, the claimant submitted to an independent medical examination conducted by Dr. Michael McFaddon, a physical and rehabilitation specialist. Dr. McFaddon agreed with Dr. Houle's permanent restrictions. The claimant told Dr. McFaddon that if he stood or walked for more than two or three hours, he had swelling and leg pain. Dr. McFaddon testified that these symptoms were a logical byproduct of the type of injury the claimant sustained. He explained that the claimant was less efficient at pumping blood out of his extremity back to his heart, which could be caused by several mechanisms including venous injury.

¶ 16 Dr. McFaddon believed that the claimant's condition was getting close to being "static," which was why he gave the claimant permanent work restrictions. He testified that he believed the claimant's treatments were "pretty much completed as far as being able to fix this condition." His permanent work restrictions for the claimant included limited standing or walking for no more than two hours with the ability to rest in a seated position with elevation of the right lower extremity for the same period. He also believed that climbing, crawling, and squatting activities were not appropriate.

¶ 17 Dr. McFaddon reexamined the claimant on January 18, 2010, after reviewing additional medical information and the surveillance video. Based on the video, he believed that the claimant should not lift greater than 50 pounds on more than an occasional basis. At that time, the claimant had reached MMI, and his other restrictions included that he could stand or walk for no more than two hours, sit down and elevate his foot for two hours, then go back to work and stand or walk for two hours. Dr. McFaddon believed that the claimant could continue this regimen throughout the day and that any further work restrictions would be best defined through an FCE.

¶ 18 Dr. McFaddon testified by way of an evidence deposition dated September 3, 2010. He testified that, after he viewed the surveillance video, he concluded that the claimant was capable of performing more activities than he previously believed to be possible. He opined that the claimant's activities depicted in the video were not consistent with the symptoms the claimant claimed to have on a daily basis. He testified that some of his restrictions were "probably overprotective," and he recommended an

FCE over a two-day testing period "to determine what appropriate work restrictions need to be imposed on a permanent basis."

¶ 19 Dr. McFaddon also testified that the surveillance video was about two hours long; included footage taken over several days; and did not show the claimant walking for more than two hours at a time, lifting weights greater than 50 pounds, working in any capacity, or running. The doctor noted that the claimant was not limping in the video but acknowledged that it was possible that he could have been favoring the injured leg when walking and that the video could have been taken when his leg was not swollen. The video showed the claimant walking only short distances, which was not inconsistent with the doctor's restrictions.

¶ 20 Dr. McFaddon testified that the main activity in the video that was inconsistent with the claimant's restrictions was footage of him riding his ATV over rough terrain while standing or partly standing and keeping a lot of weight on his feet. The doctor believed that the video showed the claimant "moving at a pretty good rate of speed" on the ATV. He agreed, however, that the ATV riding was "a small part of the video."

¶ 21 The surveillance video is not part of the record on appeal. The arbitrator viewed the video and noted that it "shows [the claimant] seated throughout the 2 minute ride as he circled his house 2 times before placing the ATV into the garage," and that "[a]t no time was [the claimant] seen standing while riding the ATV."

¶ 22 In October 2007, the claimant made a demand for vocational rehabilitation services, but the employer never authorized these services. At that same time, he began a self-directed job search. He testified that he graduated high school and had a few college

classes but never obtained a degree. His prior jobs all involved manual labor, and he believed that he could no longer perform any of these activities. He testified that his search included completing and submitting job applications from leads obtained from newspaper and internet searches. He testified that he only applied for jobs that were potentially available. He did not mark down when jobs were not available or when his searches came up empty. He also testified that there were times when he would look on the internet or in the newspaper and there would be no new job postings within his restrictions. He did not produce any job search documentation at the hearing.

¶ 23 The claimant testified that he found temporary employment at a cemetery performing lawn care, which took him three hours to complete with his wife's assistance. He was required to mow the grounds with a riding lawnmower. He mowed with his leg elevated and took breaks if his leg began to swell. He performed this job for five months during the spring and summer of 2008, earning $9.25 per hour for three hours of work per week. He testified that he inquired about full-time employment, but the cemetery did not have any full-time positions available.

¶ 24 In the fall of 2008, the claimant worked for his uncle's business in a seasonal position that required him to work 20 to 30 hours per week, depending on the weather. He earned $10 per hour, and his job duties included driving a tractor. He testified that while driving the tractor, there were times when his leg would begin to swell and he would elevate it on the tractor to reduce the pain. He also noted that, when his leg problems worsened, his uncle allowed him to leave work early. When the seasonal work ended, he was again unemployed.

¶ 25 The claimant testified that he continued with his self-directed job searches throughout 2008 and 2009, by searching online and in newspapers and by contacting friends, family, and local businesses. He testified that he sent resumes to the few places with job openings and that he had some interviews but that they did not result in any job offers.

¶ 26 In November 2009, the employer discontinued the claimant's weekly benefits. The claimant testified that this dramatically affected his ability to perform job searches as he had to discontinue his internet subscription and had problems with paying for gas to get to the job locations. He renewed his request for vocational rehabilitation services, and the employer again refused his requests.

¶ 27 In April 2010, the claimant obtained temporary employment at a farm. He worked 20 to 40 hours per week driving a tractor during planting season earning $10 per hour. He testified that he was able to elevate his leg as needed. This seasonal job ended in June 2010. During this time, he also began selling firewood, which he split himself and delivered to various homes. He spent approximately 10 hours per week performing this activity and had no problems lifting or carrying the wood. However, if his leg began to swell, he had to stop and elevate it. While working the temporary jobs, he reduced the number of his job searches because he was working more during the day, but he still continued to look for full-time employment.

¶ 28 The claimant testified that, during the latter part of 2010, he had job interviews at Walgreens, Lowe's, Home Depot, Menard's, Terminix, Paul Blandenberger Farm, Napa, Rent One, Rent-A-Center, and Rural King. He testified that all the jobs paid around

minimum wage, and none of the interviews resulted in job offers. He did not provide any contemporaneous documentation regarding these job applications or interviews.

¶ 29 The claimant testified that his main complaint was leg issues, which occurred when he stood or walked for more than one or two hours at a time. He testified that if he stood or walked for too long, his leg would begin to swell, which then caused his entire foot to go numb and become painful. When his leg became swollen, he had problems standing, lifting, or climbing. He further testified that he had fallen several times when the leg was swollen, and the only way to reduce the swelling was to stop working and elevate the leg.

¶ 30 The arbitrator found that the surveillance video showed the claimant standing, walking, and jumping off the back of a truck. The claimant testified that he could perform these activities when his leg was not swollen but had problems with the activities when his leg was swollen after standing or walking for more than two hours. When his leg was not swollen, he could ride a four-wheeler, drive his truck, and hunt. He stated, however, that when doing these activities, he must limit the time he is on his leg and must take care to elevate his leg as often as possible. He testified that he had to cut short several hunting trips because his leg became stiff and painful. He testified that when he goes hunting, he tries "to go for at least two or three hours." During that time, he is mostly sitting in his deer stand.

¶ 31 A vocational specialist, Delores Gonzalez, testified by way of an evidence deposition conducted on two separate dates. She testified that she first met the claimant after she was contacted by his attorney and asked to determine his potential for vocational

rehabilitation. She prepared a 12-page report dated October 23, 2008, containing her analysis and conclusions. When she saw the claimant, he told her that he could not stand or walk for more than an hour and a half to two hours. He could not lift more than 20 to 25 pounds if he was walking. He reported increased leg pain if he bent over and right knee pain if he knelt. He stated that he had great difficulty climbing stairs and had to hold the railing for support. He could drive for about an hour and a half before needing to get out of the vehicle and stretch. She reviewed his medical records and determined that they were consistent with his reported medical history. Gonzalez believed that the claimant's inability to stand or walk for long enough periods was his major hindrance with respect to employment. In 2008, the claimant did not ask Gonzalez to perform any vocational services on his behalf, other than the preparation of her assessment report.

¶ 32 The claimant sought Gonzalez's services again on March 5, 2010. From March 2010 through March 2011, she assisted him with vocational rehabilitation services. She helped him prepare a resume and coached him with interviewing skills. She provided job leads, assisted him with follow-ups after interviews, and recommended that he return to college. The employer did not authorize Gonzalez's assistance and did not offer to pay for the claimant to attend college.

¶ 33 In testifying about the claimant's job placement potential, Gonzalez emphasized the restrictions imposed by both Dr. Houle and Dr. McFadden. She testified that vocationally there was not much difference between the doctors' restrictions. At the time of the deposition, she had not viewed the surveillance video. In her report dated October

23, 2008, she wrote that the claimant "can go hunting but has trouble walking on uneven ground" and that he "rides an ATV but can only ride on flat ground."

¶ 34 Gonzalez recommended that the claimant continue his education, obtain his associate's degree in agribusiness, continue to a four-year institution, and obtain his bachelor's degree in agribusiness. He had completed 36 credit hours and needed approximately three more years of college to complete his degrees. Gonzalez believed that, with an agribusiness degree, there were positions that could accommodate his restrictions "because of the educational component, the managerial part of it." She advised him that if "he did not succeed at college, he would have great difficulty finding and maintaining employment that he could physically do without skills training."

¶ 35 Gonzalez testified that the claimant had been motivated throughout the time she assisted him. She did not tell him that he was unemployable in the open labor market because she did not want to discourage him. She opined that if he were to find employment it would only be at $8.50 to $10 per hour. At the time of the arbitration hearing, she had an outstanding bill in the amount of $6,624.

¶ 36 Gonzalez testified that she based her assessment, in part, on an October 13, 2010, FCE. She testified that the FCE was needed to find out whether they were working with the correct restrictions, whether the claimant needed different accommodations, or whether his condition had improved.

¶ 37 The October 13, 2010, FCE determined that the claimant could stand for 41 minutes, walk for 5.42 minutes, and sit for 43 minutes at a time before changing positions. Gonzalez stated that the FCE results were consistent with Dr. Houle's

restrictions. She did not believe that there was a stable labor market for the claimant due to the restrictions established by the FCE and Dr. Houle. The FCE evaluator noted in the report that the claimant gave "high levels of physical effort" during the examination and that test results in conjunction with clinical observations "suggested the presence of fully reliable reports of pain and disability." The evaluator recommended that the claimant "return to his vocational specialist to discuss career options based on this evaluation outcome" and resume "a progressive strengthening and walking program to improve his functional mobility." The evaluator noted that, prior to his injury, the claimant enjoyed fishing and hunting and that he stated that he now had "some difficulties climbing the deer stand if his leg is swollen."

¶ 38 Gonzalez believed that, as of January 7, 2011, the claimant was unemployable in the open labor market. She based her conclusion on the FCE, Dr. Houle's permanent work restrictions, and the claimant's unsuccessful job search. She testified that, in order for the claimant to obtain reemployment, he had to find an employer who would accommodate his restrictions. She believed finding such an employer was unlikely because most employers had hundreds of people applying for jobs and were more likely to hire someone who did not have work restrictions.

¶ 39 The arbitrator found that the claimant sustained a workplace accident on October 13, 2006, and that his condition of ill-being was causally related to the accident. In his findings, the arbitrator noted: "[The claimant] sustained a traumatic crush injury to his right leg which has caused him to have continuing problems with swelling and numbness when he remains on the leg for greater than 2 hours. [The claimant's] medical condition

was identified by the treating physician and confirmed by employer's medical examiner. There is no dispute."

¶ 40 The arbitrator awarded the claimant TTD and maintenance benefits for the periods of October 13, 2006, through April 1, 2010, and from July 1, 2010, through April 13, 2011. He awarded a wage-differential benefit pursuant to section 8(d)(1) of the Act in the amount of $335.50 per week for the period of April 2, 2010, through June 30, 2010, the period during which the claimant worked at a farm. The arbitrator calculated the wage differential based upon what the claimant would have earned in his former employment ($903.26 per week) and his actual earnings of $400 per week during that period. He also awarded a wage-differential benefit of $355.46 per week, beginning April 13, 2011, and lasting for the duration of the claimant's disability. This wage-differential award was based on the claimant's prior earnings ($903.26) and the average of his potential earnings of $370, based on Gonzalez's testimony that he would be capable of earning between $8.50 and $10 per hour if he could find employment.

¶ 41 The arbitrator awarded the claimant medical expenses totaling $1,962.58 and vocational rehabilitation expenses of $6,624 for Gonzalez's services. He found that the employer was unreasonable and vexatious in refusing to pay expenses under the Act and awarded the claimant penalties and attorney fees as sanctions pursuant to sections 16, 19(k), and 19(*l*) of the Act.

¶ 42 The employer sought review of the arbitrator's decision before the Commission. The Commission found that the claimant "is unable to work in the coal mines per the

[FCE], Dr. Houle's records and Dr. McFadden's deposition." However, it questioned "the validity of [the claimant's] search for alternative employment."

¶ 43 The Commission modified the award by finding that the claimant reached MMI on November 10, 2009, and that he was entitled only to TTD benefits from October 14, 2006 (the date of the accident), through November 10, 2009 (the date of MMI). The Commission questioned the validity of the claimant's employment search and, therefore, found that he had not proven that he was entitled to a wage-differential award. Instead, the Commission awarded him a permanency award of 17.5% of the person as a whole. The Commission also denied the claimant's claim for Gonzalez's vocational rehabilitation services, finding that her fees were unreasonable and that "there is nothing in the record that would suggest a reasonable amount." Finally, the Commission determined that the employer had a reasonable basis to dispute payment of benefits and, therefore, declined to adopt the arbitrator's award of penalties and attorney fees.

¶ 44 The claimant sought judicial review of the Commission's decision, and the circuit court entered a judgment confirming the decision. The claimant appealed the circuit court's judgment to this court. In an unpublished decision, we ruled that we were "unable to properly review the Commission's decision because it [was] unclear to us exactly what the Commission found" when it concluded that the claimant had not proven an impairment to his earnings, which would support a wage-differential award. *Head v. Illinois Workers' Compensation Comm'n*, 2013 IL App (5th) 120543WC-U, ¶ 31. We noted that the Commission found that the claimant was unable to return to work as a coal miner but "made no finding regarding Gonzalez's testimony regarding the labor market

for a person with the claimant's skills and limitations." *Id*. Although the Commission found that the claimant's testimony with respect to his job search was not credible, it did not comment on his labor market evidence introduced through Gonzalez's expert testimony. Therefore, we concluded that we were unable to properly review the Commission's decision. *Id.* ¶ 35. We vacated the circuit court's judgment confirming the Commission's decision, vacated the Commission's decision in its entirety, and remanded the matter to the Commission for "appropriate factual findings to support its determination of the appropriate permanent partial disability benefits to be awarded to the claimant." *Id*.

¶ 45 On November 7, 2014, the Commission entered its decision on remand. In its decision on remand, the Commission evaluated Gonzalez's "credibility regarding [the claimant's] skills and limitations" as follows:

> "The Commission finds that *** Gonzalez's opinions regarding [the claimant's] capability to work or the job's [*sic*] he may be incapable of working are not persuasive. The history Ms. Gonzalez received from [the claimant] was not a valid history of his complaints. [The claimant] never told her about his hunting for two to three hours. Nowhere does he mention that he deer hunts or that he climbs into the deer stand. He never tells her that he drives a four-wheeler over rough terrain at a fast speed. Instead, all he tells her was that he had great difficulty trying to climb stairs and has to hold the railing for support. He could drive for about an hour and a half but then he would need to get out of the car and stretch and walk around before returning to his car. He tried to help around the

house but had trouble bending, kneeling and carrying. She admitted that climbing into a deer stand could be inconsistent with what he told her about climbing stairs."

¶ 46 The Commission found that the claimant's descriptions of his limitations to Gonzalez were not credible, and it emphasized the surveillance video which, according to the Commission, showed him riding an ATV over rough terrain at fast speeds, hunting, and jumping off the back of a truck. The Commission noted than an expert's opinions are only as valid as the facts underlying them and concluded that Gonzalez's testimony regarding the amount of money the claimant can make after his injury "to be of little weight and credibility."

¶ 47 The claimant sought a judicial review of the Commission's decision on remand, and the circuit court entered a judgment confirming the decision. The claimant now appeals the circuit court's judgment.

¶ 48 ANALYSIS

¶ 49 I

¶ 50 PPD Award: Wage Differential or Percentage of the Person as a Whole

¶ 51 The first issue raised by the claimant concerns the Commission's decision to award PPD benefits based on a percentage of a person as a whole under section 8(d)(2) of the Act rather than a wage differential under section 8(d)(1) of the Act.

¶ 52 In the present case, it is undisputed that the claimant sustained a disability as a result of a workplace accident and is entitled to a PPD award. Once a claimant proves that he has sustained a disability, the question of compensation arises. Section 8(d) of the

Act sets out two types of PPD awards: subsection (1) provides a wage-differential award, and subsection (2) provides a percentage-of-the-person-as-a-whole award. 820 ILCS 305/8(d) (West 2006); *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721, 727, 734 N.E.2d 482, 487 (2000). The supreme court has expressed a preference for wage-differential awards over scheduled awards. *General Electric Co. v. Industrial Comm'n*, 89 Ill. 2d 432, 438, 433 N.E.2d 671, 674 (1982). The purpose of a wage-differential award is to compensate an injured claimant for his reduced earning capacity. *Jackson Park Hospital v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 142431WC, ¶ 39, 47 N.E.3d 1167.

¶ 53 The issue of whether a claimant is entitled to a wage-differential award is generally a question of fact for the Commission to determine. *Dawson v. Illinois Workers' Compensation Comm'n*, 382 Ill. App. 3d 581, 586, 888 N.E.2d 135, 139 (2008). We review the Commission's factual findings under the manifest-weight-of-the-evidence standard. *Tower Automotive v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 427, 434, 943 N.E.2d 153, 160 (2011). "For a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent from the record on appeal." *City of Springfield v. Illinois Workers' Compensation Comm'n*, 388 Ill. App. 3d 297, 315, 901 N.E.2d 1066, 1081 (2009).

¶ 54 Under section 8(d)(1), an impaired worker is entitled to a wage-differential award when (1) he is "partially incapacitated from pursuing his usual and customary line of employment" and (2) there is a "difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was

engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident." 820 ILCS 305/8(d)(1) (West 2006). Section 8(d)(2) provides for a PPD award based on a percentage of the person as a whole when, among other circumstances, the claimant's "injuries partially incapacitate him from pursuing the duties of his usual and customary line of employment but do not result in an impairment of earning capacity." 820 ILCS 305/8(d)(2) (West 2006).

¶ 55 In the present case, the Commission found that the claimant cannot return to his employment as a coal miner, and the employer does not challenge that finding on appeal. Therefore, the crucial issue in determining whether the claimant is entitled to a wage-differential award is whether he proved that he suffered an impairment in his "earning capacity." *Jackson Park Hospital*, 2016 IL App (1st) 142431WC, ¶ 42. If the claimant proved a loss in his earning capacity, then the Commission's PPD award based on a percentage of the person as a whole is against the manifest weight of the evidence. *Id*.; *Gallianetti*, 315 Ill. App. 3d at 728, 734 N.E.2d at 488 ("the plain language of section 8(d) prohibits the Commission from awarding a percentage-of-the-person-as-a-whole award where the claimant has presented sufficient evidence to show a loss of earning capacity").

¶ 56 At the arbitration hearing, the only vocational expert to testify explained that the claimant's work restrictions prevented him from being employable in the open labor market. She opined that if he were able to find employment it would only be at $8.50 to $10 per hour. She explained that she based her opinion on the claimant's medical

records, the FCE, his failed job search, and the restrictions of both Dr. Houle and Dr. McFaddon. She testified that, with the claimant's job skills, his inability to stand or walk for long enough periods was his major hindrance with respect to employment and that it would be very difficult to find an employer that could accommodate the restrictions.

¶ 57 On remand, the Commission did not reject Gonzalez's opinion with respect to the impairment of the claimant's earning capacity *if* he was required to work under the restrictions imposed by Dr. Houle. Instead, the Commission discredited Gonzalez's opinion because it did not believe that the claimant proved that he needed the work restrictions upon which Gonzalez relied in forming her opinion, noting that an expert's opinion is only as valid as the facts underlying them. However, the Commission's finding that the claimant failed to prove his need for the work restrictions imposed by Dr. Houle is contrary to the manifest weight of the evidence.

¶ 58 Dr. Houle, an orthopedic surgeon, testified that the claimant had permanent work restrictions that limited him to being able to stand or walk for no more than two hours at a time without being able to rest and elevate his leg for 45 minutes and that prohibited him from crawling, squatting, or climbing. He explained how a crushing injury to a leg could cause damage to valves inside the leg's veins, valves that assist in carrying blood from the lower extremity to the heart. Damaged valves hinder the veins' ability to return blood back to the heart, which causes blood to collect in the lower extremity and seep into the soft tissue of the lower extremity, causing leg pain. When this swelling occurs, elevating the leg helps the blood circulate back to the heart. Dr. Houle testified that the claimant was at MMI and that this condition of ill-being in his leg was permanent. Similar to

Gonzalez's testimony, Dr. Houle opined that the claimant's employment prospects were limited to jobs that could accommodate his restrictions, which "would probably be more in the light duty type work than the moderate duty." The Commission relied, in part, on Dr. Houle's medical records in concluding that the claimant could not return to work as a coal miner.

¶ 59 In suggesting that Dr. Houle's restrictions were not accurate, the Commission wrote in its decision on remand that during the doctor's first deposition, he testified that he believed that it "would be impossible" for the claimant to squat, climb, and crawl. The Commission described this testimony to suggest that the surveillance video shows the claimant engaged in activities that are contrary to the doctor's understanding of the claimant's limitations. However, the Commission's description of the doctor's testimony is not accurate. He did not testify that it was physically impossible for the claimant to squat, climb, or crawl.

¶ 60 During his first deposition, the doctor, in fact, explained that it would not surprise him if the claimant squatted, crawled, or climbed "momentarily." In describing the squatting, crawling, and climbing restrictions, the doctor testified that he was "thinking more of a work environment where he may be in that position for prolonged periods of time." He testified that he wrote the restriction prohibiting the claimant from performing any of those activities so the restriction would be "respected" in a work environment. He added that if the claimant squatted to "pick up something at home, [he] [had] no trouble with that."

¶ 61 The Commission also noted that the claimant "mentioned nothing to [Dr. Houle] about hunting, fishing or riding ATV's." However, Dr. Houle testified that he viewed the surveillance video showing the claimant riding an ATV. He testified, "I think riding is sitting, so I don't see a whole lot of trouble sitting down riding an ATV." He testified that riding an ATV from a sitting position was not against his medical restrictions. He further testified that he had no problem with the claimant hunting from an ATV if he is "not doing too much of it." He also saw the claimant climb into the back of a pickup truck in the video and opined that nothing in the video altered his medical opinions and restrictions. The Commission's suggestion that Dr. Houle was unaware of the claimant's hunting or riding an ATV is contrary to the manifest weight of the evidence.

¶ 62 Furthermore, the claimant submitted to an independent medical examination conducted by a physician selected by the employer, Dr. McFaddon. Dr. McFaddon initially examined the claimant on August 29, 2007, and agreed with Dr. Houle's permanent restrictions. He agreed that the claimant was at MMI and had permanent restrictions that prevented him from standing or walking for no more than two hours with the ability to rest in a seated position with elevation of the right lower extremity for the same period. He agreed that climbing, crawling, and squatting were not appropriate. Similar to Dr. Houle's testimony, Dr. McFaddon explained that the claimant was less efficient at pumping his blood out of his extremity back to his heart, which could be caused by several mechanisms including venous injury. He testified that the claimant's restrictions were permanent as there was no method to fix the condition of ill-being. The Commission relied, in part, on Dr. McFaddon's testimony in finding that the conditions of

the claimant's leg, caused by the industrial accident, prevented him from returning to work as a coal miner.

¶ 63 The employer presented evidence that Dr. McFaddon viewed the surveillance video that showed the claimant engaged in various activities over a seven-day period, including walking into a McDonald's restaurant, climbing into and down from the back of a pickup truck, and riding an ATV. Although the doctor testified that he believed that the claimant's activities depicted in the video were not consistent with his symptoms, the doctor also admitted that the video did not show the claimant lifting weights greater than 50 pounds, working in any capacity, or running. The doctor agreed that the video showed the claimant walking only for "pretty short distances," which was not inconsistent with his restrictions, and the doctor could not remember whether it showed the claimant favoring his injured leg. He remembered that the video did not show the claimant standing or walking for over two hours at a time.

¶ 64 Dr. McFaddon elaborated that the main activity in the video that was inconsistent with the claimant's restrictions was riding an ATV over uneven terrain and at "a pretty good rate of speed." He did not remember how long the video showed the claimant riding an ATV but admitted that the ATV riding was only "a small part of the video." At the time he testified, eight months had passed since Dr. McFaddon had viewed the surveillance video, and he did not remember many aspects of the two-hour video. His "recollection" was that the claimant "may have not been in a fully-seated position throughout the duration that he was on the ATV." The arbitrator, however, viewed the video at the time of the hearing and noted that it showed the claimant "seated throughout

the 2 minute ride as he circled his house 2 times before placing the ATV into the garage," and that "[a]t no time was [the claimant] seen standing while riding the ATV." Presumably, the Commission also viewed the video. It did not contradict the arbitrator's finding with respect to the claimant being in a seated position while riding the ATV. In its decision on remand, the Commission noted only that the video showed the claimant "riding an ATV over rough terrain at fast speeds."

¶ 65 In addition, Dr. McFaddon examined the claimant both before and after viewing the surveillance video. After his first examination, his impressions included, among other things, "[p]ersistent sensation impairment of the right lower extremity within a peroneal nerve distribution" and "[i]ntermittent right lower extremity pain." He testified that after viewing the video and reexamining the claimant, these two impressions remained "essentially unchanged." He also testified that leg swelling after standing too long was "a logical byproduct of this type of accident."

¶ 66 Even after viewing the video, the doctor testified that he believed that he had enough information to issue his permanent restrictions but that the restrictions might be "overprotective." He concluded that an FCE, "probably conducted over a two-day testing period," should be used to determine the appropriate permanent work restrictions. After Dr. McFaddon's deposition, the claimant underwent an FCE on October 13, 2010, and the evaluator determined that the claimant could stand for 41 minutes, walk for 5.43 minutes, and sit for 43 minutes at a time before changing positions. The FCE evaluator's restrictions, therefore, were not inconsistent with Dr. Houle's and Dr. McFaddon's restrictions. The employer did not present any evidence to impeach the credibility of the

FCE report or offer any follow-up testimony from Dr. McFaddon following the FCE. Neither Dr. McFaddon nor any other expert offered an opinion that the testing methods utilized in the FCE were insufficient for measuring the level of the claimant's physical impairment. Therefore, at best for the employer, Dr. McFaddon's testimony is inconclusive and does not establish that Dr. Houle's restrictions are excessive or improper. Dr. McFaddon's testimony, therefore, is not a basis for discrediting Gonzalez's assessment of the impairment of the claimant's earning capacity.

¶ 67 With respect to his hunting activities, the claimant testified that he was an avid hunter prior to the accident and that, following the accident, he limited his hunting to two or three hours, most of which involved him sitting in a deer stand. He testified that he had to cut short several hunting trips because his leg became stiff and painful. He explained that he used a four-wheeler for hunting because riding the four-wheeler was easier on his leg than walking, and he could ride, as well as stand and walk, when his leg was not swollen. However, he had to limit the time he performed these activities and elevate his leg when it became swollen.

¶ 68 The Commission emphasized the claimant's hunting activities as a basis to discredit Gonzalez's testimony by noting as follows: "He did not tell her about such activities he undertook such as deer hunting and climbing into a deer stand." However, Gonzalez testified that she reviewed the FCE report and considered the findings in that report in assessing the claimant's skills and limitations. In the report, the FCE evaluator specifically noted that, prior to the work-related injury, the claimant enjoyed fishing and hunting as hobbies. The evaluator wrote, "*He states he has now some difficulties*

climbing the deer stand if his leg is swollen." (Emphasis added.) Furthermore, in her report dated October 23, 2008, Gonzalez wrote that the claimant "can go hunting but has trouble walking on uneven ground" and that he "rides an ATV but can only ride on flat ground." The Commission's finding that Gonzalez was unaware of the claimant's hunting activities is contrary to the manifest weight of the evidence.

¶ 69 After incorrectly suggesting that Gonzalez was unaware of the claimant's hunting activities, the Commission then concluded that she "admitted that climbing into a deer stand could be inconsistent with what he told her about climbing stairs." Again, this finding is not supported by the record. During the cross-examination of Gonzalez, the following colloquy took place:

"Q. Did [the claimant] tell you he had any problems going deer hunting and climbing into a deer stand?

A. No, sir.

Q. Do you think that would be a little bit inconsistent with that history of trying to climb stairs?

***

A. I don't know very much about tree stands. Are some of them on the ground?

Q. Climbing a tree to get into a tree stand while deer hunting, do you think if he was able to do that it would be inconsistent with what he told you about trying to climb stairs?

A. It could be. Some hunters have told me they had stands on the ground.

Q. I'm not talking about stands on the ground. If the evidence shows he's climbing up a tree to get into a tree stand to deer hunt, would that be inconsistent?

A. Does he hold on to climb up?

Q. I hope so.

A. Okay. *I don't know that it would be inconsistent if he says he holds a railing. Do you hold a ladder to go up in a tree stand? I don't know. I've never done it.*

Q. Okay.

A. Do you climb a ladder?

Q. A tree is perpendicular to the ground, straight up, correct?

A. That's why I was asking if it was a ladder or if he had to do it with the branches by themselves without the ladder. I'm not a hunter. I don't know those things." (Emphasis added.)

¶ 70 Gonzalez's testimony with respect to the deer stand, detailed in its entirety above, when read as a whole, suggests that she believed that climbing and holding onto a ladder to reach a deer stand would not be inconsistent with the claimant's reported condition but that climbing into a tree stand by using tree branches without a ladder would be inconsistent. There is no evidence in the record that the claimant reached his deer stand by climbing tree branches.

¶ 71 Alternatively, at best for the employer, Gonzalez's testimony could be interpreted as her not knowing whether climbing a tree to reach a deer stand would be inconsistent with the claimant's restrictions since she is not a deer hunter and is not familiar with deer

stands. Either way, the Commission's finding that she "admitted that climbing into a deer stand could be inconsistent with what he told her about climbing stairs" is contrary to the manifest weight of the evidence and, therefore, is not a finding that stands to discredit her opinion regarding the claimant's limitations.

¶ 72 The Commission noted that the claimant told Gonzalez that he weighed 235 pounds at the time of the accident, which "was proven untrue by the medical records following the date of loss." However, Gonzalez's opinion with respect to the claimant's limitations was not based on his representation of his weight at the time of the accident. The accuracy of his representation of his weight at the time of the accident does not establish a basis to discredit Gonzalez's opinion with respect to his earning capacity.

¶ 73 The Commission discredited the results of the FCE by noting that the evaluator did not test "in regard to how long [the claimant] could stand without significant swelling in his leg." Although the FCE evaluator determined that the claimant could stand without a seated rest for only 41 minutes, the Commission found it significant that there was no mention of leg swelling after two hours of standing. However, the FCE evaluator specifically opined in his report that during the testing, the claimant gave "high levels of physical effort." In addition, the evaluator specifically noted that the test results were "fully reliable" with respect to "reports of pain and disability" and that "[t]he recommendations for work restrictions are limited to his functional abilities as described" in the report. During the testing, the evaluator observed the claimant's body mechanics and control, and the report described tests the evaluator utilized to assess any symptom magnification, inappropriate illness behavior, somatic amplification, and nonorganic

signs. In the "next day follow-up" section of the FCE report, the evaluator noted that the claimant reported "increased swelling in his right lower leg before it got progressively better." Although the FCE examiner did not specifically measure swelling in the claimant's lower extremity, the FCE, nonetheless, measured the claimant's physical capabilities and functional tolerance, and the evaluator's conclusions are consistent with Dr. Houle's and Dr. McFaddon's restrictions as well as Gonzalez's testimony about the claimant's limitations. As noted above, the employer presented no testimony, opinions, or other evidence to contradict or discredit these test findings, and there is no basis in the record to disregard the evaluator's conclusions. In fact, the Commission relied on the FCE, in part, in concluding that the claimant was "unable to return to work in the coal mines." Its conflicting finding that the FCE does not support Gonzalez's opinion is against the manifest weight of the evidence.

¶ 74 To establish a diminished earning capacity, a claimant "must prove his actual earnings for a substantial period before his accident and after he returns to work, or in the event he is unable to return to work, he must prove what he is able to earn in some suitable employment." *Smith v. Industrial Comm'n*, 308 Ill. App. 3d 260, 265-66, 719 N.E.2d 329, 333 (1999).

¶ 75 Based on the evidence presented at the hearing, the claimant proved an impairment of his earning capacity. The evidence established both his earnings prior to the accident and what he can make in suitable employment following the accident. The parties stipulated that the claimant's average weekly wage prior to the accident was $903.26. He then had the burden of proving what he would be able to earn in some

suitable employment. *Franklin County Coal Corp. v. Industrial Comm'n*, 398 Ill. 528, 531, 76 N.E.2d 457, 459 (1947).

¶ 76 Gonzalez explained how the claimant's work restrictions, established by the two doctors and the FCE, limited his ability to find employment in the sedentary/light work category. She testified about her labor market study and her conclusion, based on the survey and her experience, that the most the claimant could expect to earn with his restrictions was $8.50 to $10 per hour instead of his previous hourly rate of $22.58 per hour. The employer did not offer any evidence of the existence of a job category or position that offers the claimant wages greater than $10 per hour. It did not offer a contrary labor market study. The arbitrator awarded the claimant a wage-differential award based on Gonzalez's testimony. On review, the Commission did not discredit Gonzalez's labor market study or her experience in placing workers in southern Illinois. Instead, it questioned only her reliance on the work restrictions imposed by Drs. Houle and McFaddon. For the reasons noted above, however, the Commission's rejection of those work restrictions is contrary to the manifest weight of the evidence. Therefore, the Commission's ultimate finding that the claimant failed to prove an impairment of his earning capacity and, in turn, its denial of a wage-differential award are also against the manifest weight of the evidence.

¶ 77 Because the claimant proved both elements of a claim for wage-differential benefits, we must reverse that portion of the judgment of the circuit court confirming the Commission's decision with respect to PPD benefits and remand the claim to the

Commission with directions to the Commission to reinstate the arbitrator's PPD award based on a wage differential.

¶ 78 II

¶ 79 Maintenance Benefits

¶ 80 Next, the claimant argues that the Commission erred in modifying the arbitrator's award by denying maintenance benefits after November 10, 2009. "[T]he determination of whether a claimant is entitled to maintenance benefits is a question to be decided by the Commission, and its finding will not be reversed unless it is against the manifest weight of the evidence." *W.B. Olson, Inc. v. Illinois Workers' Compensation Comm'n*, 2012 IL App (1st) 113129WC, ¶ 39, 981 N.E.2d 25.

¶ 81 The arbitrator awarded the claimant TTD/maintenance benefits for a period beginning on the date of the accident until the date of the arbitration hearing, minus a period during which the claimant was temporarily employed. Specifically, the arbitrator awarded "weekly maintenance/temporary total disability benefits of $602.16/wk, for the period of 10/13/06 through 4/1/10 and again from 7/1/10 through 4/13/11," which is a period of 222 weeks of TTD/maintenance benefits. The arbitrator found that, for the period during which the claimant was able to find temporary employment, beginning April 2, 2010, through June 30, 2010, he was entitled to a wage-differential benefit.

¶ 82 On review, the Commission determined that the claimant was "only entitled to temporary total disability from October 14, 2006, to November 10, 2009. At that point in time [the claimant] was at maximum medical improvement." The Commission, therefore, awarded the claimant TTD benefits in the amount of $602.16 per week for a

period of 160 3/7 weeks. On remand, the Commission incorporated "the findings of fact and law contained" in its prior decision and again awarded the claimant TTD benefits for 160 3/7 weeks.

¶ 83 On appeal, the claimant first argues that the Commission made no reference to maintenance benefits in either of its decisions and, therefore, affirmed that part of the arbitrator's award and made a calculation error in awarding only TTD benefits. We disagree. Contrary to the claimant's assertion, we believe it is apparent that the Commission intended to deny maintenance benefits in both its original decision and in its decision on remand by awarding only TTD benefits up to the date on which, according to the Commission, the claimant was at MMI. It denied maintenance benefits after November 10, 2009, the date on which it believed the claimant reached MMI.

¶ 84 Alternatively, the claimant argues that the record establishes he was entitled to maintenance benefits for the period after he reached MMI through the time of the arbitration hearing, minus the period during which he was able to find temporary employment. We agree. The record establishes that the claimant was engaged in a self-directed plan to obtain employment and successfully obtained temporary employment through his efforts after he reached MMI. We believe that the unrebutted evidence establishes that the claimant's self-directed job search qualifies as vocational rehabilitation; therefore, he was entitled to maintenance while engaged in his job search. The Commission's denial of maintenance benefits is contrary to the manifest weight of this evidence.

¶ 85 The claimant's work-related accident occurred on October 13, 2006, and the Commission found that the conditions of ill-being in his right leg caused by the industrial accident permanently prevent him from continuing to work as a coal miner. The parties do not dispute this finding. The Commission also found that the claimant reached MMI on November 10, 2009, and the record establishes that the employer did not offer the claimant any work within his restrictions. In order for a claimant to be entitled to TTD benefits, the claimant must demonstrate that he did not work and that he was unable to work. *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 759, 800 N.E.2d 819, 825 (2003). The dispositive test is whether the claimant's condition has stabilized and whether he has reached MMI. *Id.* at 760, 800 N.E.2d at 826. The Commission ended the claimant's TTD benefits on the date it determined that he had reached MMI.

¶ 86 Section 8(a) of the Act requires an employer to pay for an employee's necessary physical, mental, and vocational rehabilitation, including the costs and expenses of maintenance. 820 ILCS 305/8(a) (West 2006). Maintenance is awarded under section 8(a) of the Act incidental to vocational rehabilitation. *W.B. Olson, Inc.*, 2012 IL App (1st) 113129WC, ¶ 39. Therefore, an employer is obligated to pay maintenance only "while a claimant is engaged in a prescribed vocational-rehabilitation program." *Id.*

¶ 87 "A claimant is generally entitled to vocational rehabilitation when he sustains a work-related injury which causes a reduction in his earning power and there is evidence that rehabilitation will increase his earning capacity." *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1019, 832 N.E.2d 331, 347 (2005). The primary goal of rehabilitation is to return the injured employee to work. *Schoon v. Industrial Comm'n*, 259 Ill. App. 3d

587, 594, 630 N.E.2d 1341, 1346 (1994). Vocational rehabilitation may include, but is not limited to, counseling for job searches, supervising a job search program, and vocational retraining including education at an accredited learning institution. 820 ILCS 305/8(a) (West 2006). An employee's self-initiated and self-directed job search or vocational training may constitute a "vocational-rehabilitative program" under section 8(a). *Roper Contracting v. Industrial Comm'n*, 349 Ill. App. 3d 500, 506, 812 N.E.2d 65, 70-71 (2004). Additionally, "rehabilitation efforts may be undertaken even though the extent of the permanent disability cannot yet be determined." *Freeman United Coal Mining Co. v. Industrial Comm'n*, 318 Ill. App. 3d 170, 180, 741 N.E.2d 1144, 1152 (2000).

¶ 88 As noted above, it is undisputed that the claimant suffered a workplace accident and can no longer pursue his usual and customary line of employment. All of the physicians who examined him imposed permanent work restrictions, including standing and walking restrictions. Also, as we discussed above, the record in this case establishes that these permanent restrictions have resulted in a reduction in his earning potential.

¶ 89 Therefore, the analysis of the issue of whether the claimant is entitled to vocational rehabilitation and maintenance after reaching MMI turns on whether there is evidence that rehabilitation could increase his earning capacity. Dr. Houle released the claimant at MMI on October 11, 2007, with permanent work restrictions. The employer's IME doctor examined the claimant on October 29, 2007, and confirmed that the claimant had reached MMI and had permanent work restrictions. The record establishes that the claimant then embarked on a self-directed effort to increase his earning capacity through

job searches in an attempt to find employment within his restrictions. Importantly, the record establishes that he was, in fact, successful in increasing his earning capacity by obtaining several positions of temporary employment during which he could elevate his leg as needed. The record, therefore, establishes that his rehabilitation efforts increased his earning capacity.

¶ 90 The record establishes that the claimant made a demand for vocational rehabilitation services in October 2007, the month his doctor released him at MMI, but the employer never authorized those services. The claimant began a self-directed job search, but his skills and prior job experience were limited to manual labor that fell outside of his restrictions. His job search included leads from newspapers and internet searches, and he applied for jobs that were potentially available.

¶ 91 In September 2008, the claimant hired Gonzalez to perform an assessment of his need for vocational rehabilitation. On October 23, 2008, she prepared a 12-page report of her assessment, which outlined the claimant's social, vocational, and medical history. She interviewed him, reviewed his medical records, and summarized her interview and his medical records in the report. She analyzed the transferability of his skills and determined that he was a good candidate for vocational rehabilitation. At that time, the claimant did not hire Gonzalez for vocational rehabilitation services. The employer denied his request for vocational rehabilitation services, but he continued with his self-directed job search. Finally, in March 2010, he hired Gonzalez to help him find employment. She conducted a labor market survey and prepared a 12-page report of her

survey to identify positions for the claimant within a 50-mile radius of his home, identifying 20 possible employers.

¶ 92 Through his efforts, the claimant obtained temporary employment at a farm working 20 to 40 hours per week driving a tractor during planting season and earning $10 per hour beginning in April 2010. This work fell within his restrictions because he was able to elevate his leg as needed. The seasonal job, however, ended at the end of June 2010. As a result of this employment, for the period of April 2, 2010, through June 30, 2010, the arbitrator awarded the claimant a wage-differential benefit, rather than maintenance. The arbitrator resumed the claimant's maintenance benefits for the period beginning July 1, 2010, up to the date of the arbitration hearing on April 13, 2011, a period during which he continued with his self-directed job search as well as utilizing assistance from Gonzalez.

¶ 93 Gonzalez testified that she assisted the claimant beginning in March 2010 through March 2011 and that her assistance included providing him with job leads, assisting him with follow-up interviews, and coaching him with interviewing skills. The claimant testified that during the latter part of 2010, he had job interviews at Walgreens, Lowe's, Home Depot, Menard's, Terminix, Paul Blandenberger Farms, Napa, Rent One, Rent-A-Center, and Rural King. None of these interviews resulted in employment.

¶ 94 Based on this record, we believe that the arbitrator's award of maintenance benefits for the periods during which the claimant conducted self-directed job searches and worked with Gonzalez was proper and supported by the record, and the Commission's modification of those benefits was against the manifest weight of the

evidence. The unrebutted evidence establishes that, during these periods, the claimant undertook efforts to increase his earning capacity, unsuccessfully interviewed with multiple employers, but successfully increased his earning capacity with temporary employment. See *Greaney*, 358 Ill. App. 3d at 1020, 832 N.E.2d at 347-48. This evidence establishes all of the elements necessary for an award of maintenance. The Commission's denial of maintenance benefits is contrary to the manifest weight of this unrebutted evidence.

¶ 95 III

¶ 96 Denial of Gonzalez's Bill for Vocational Services

¶ 97 Next, the claimant argues that the Commission's denial of the bill for Gonzalez's vocational services was against the manifest weight of the evidence. Again, we agree.

¶ 98 Questions regarding the reasonableness of charges that are payable under section 8(a) of the Act are questions of fact to be resolved by the Commission, and the Commission's determination will not be disturbed on review unless it is against the manifest weight of the evidence. *Max Shepard, Inc. v. Industrial Comm'n*, 348 Ill. App. 3d 893, 903, 810 N.E.2d 54, 63 (2004). "The standard of reasonableness is that which is usual and customary for similar services in the community where the services were rendered." *Ingalls Memorial Hospital v. Industrial Comm'n*, 241 Ill. App. 3d 710, 717, 609 N.E.2d 775, 781 (1993).

¶ 99 The Commission found that Gonzalez's charges were unreasonable, but the record does not support that finding. The record establishes that the claimant requested Gonzalez's vocational rehabilitation services after the employer refused to authorize such

services. Gonzalez provided the claimant services that included job placement, interviewing skills, and resume preparation. The record includes her assessment of the claimant's vocational rehabilitation potential, her labor market study, and her letters to the claimant's attorney itemizing her placement efforts.

¶ 100 Gonzalez testified that she performed the labor market study over a three-day period in March 2010 and spent approximately two hours each day working on the study. The record includes her letters to the claimant's attorney dated August 31, September 30, October 31, and December 1, 2010, and January 4, February 4, and March 1, 2011, in which she outlined the services performed for the claimant each month, the date on which services were provided, and details with respect to potential employers contacted on his behalf.

¶ 101 She testified that she does vocational rehabilitation services for both employers and employees in the workers' compensation setting and charges $100 per hour in these cases. She also does work for the Department of Labor charging $75 per hour and the Missouri Second Injury Fund charging $90 per hour.

¶ 102 Gonzalez testified that, when she began helping the claimant with job development, she used the services of a job placement assistant, Carol Jeffries, who worked as an independent contractor. She paid Jeffries $45 per hour to perform placement services under her supervision. On Gonzalez's statements, her services and Jeffries' services are "all lumped together," and she bills Jeffries' services at $100 per hour because she is usually involved with Jeffries' time as well. She estimated that Jeffries had worked 150 to 200 hours on the claimant's case, that she had worked 75 to 80

hours, and that she had billed for only "probably a hundred [hours] over five months." The employer did not present any testimony to establish that the amount that Gonzalez billed for the time spent or that her workers' compensation hourly rate were unreasonable. For preparing reports, Gonzalez dictated the reports and had a typist prepare the actual report. The typist charged her $0.16 per line and told her how long it took to type the reports. She billed the typist's services at $45 per hour, which she testified was "a standard going rate."

¶ 103 Gonzalez testified that her bill for vocational rehabilitation services performed on the claimant's behalf was $6,624. As we determined above, the evidence in the record establishes that the claimant was entitled to vocational rehabilitation services. Gonzalez's monthly bills set out the tasks that she and Jeffries performed on the claimant's behalf, and she billed for only a portion of the hours that they spent working on the claimant's case at $100 per hour. Her testimony indicated that her hourly rate was consistent with the hourly rate she charged for Social Security or Department of Labor cases. The employer offered no evidence to contradict Gonzalez's claim that her billing practices met industry standards. Under these facts, the Commission's denial of her $6,624 bill was against the manifest weight of the evidence.

¶ 104 IV

¶ 105 Penalties and Attorney Fees

¶ 106 Finally, the claimant argues that the Commission's denial of penalties and fees was against the manifest weight of the evidence. We disagree.

¶ 107 The claimant requested penalties and fees under sections 16, 19(k), and 19(*l*) of the Act. 820 ILCS 305/16, 19(k), 19(*l*) (West 2006).

¶ 108 Penalties under section 19(*l*) are in the nature of a late fee, and the assessment of a penalty is mandatory if a payment is late and the employer cannot show an adequate justification for the delay. *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 763, 800 N.E.2d 819, 829 (2003). "In determining whether an employer has 'good and just cause' in failing to pay or delaying payment of benefits, the standard is reasonableness." *Id*. When the employer acts in reliance upon reasonable medical opinion or when there are conflicting medical opinions, section 19(*l*) penalties ordinarily are not imposed. *Matlock v. Industrial Comm'n*, 321 Ill. App. 3d 167, 173, 746 N.E.2d 751, 756 (2001). The Commission's evaluation of the reasonableness of the employer's delay is a question of fact that will not be disturbed unless it is contrary to the manifest weight of the evidence. *Crockett v. Industrial Comm'n*, 218 Ill. App. 3d 116, 121-22, 578 N.E.2d 140, 143 (1991).

¶ 109 Section 19(k) of the Act provides as follows: "In [the] case where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation ***, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award." 820 ILCS 305/19(k) (West 2006).

¶ 110 The standard for awarding penalties pursuant to section 19(k) is higher than the standard under section 19(*l*). Section 19(k) requires more than a showing that the employer simply failed, neglected, or refused to make payment or unreasonably delayed

payment without good and just cause. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 515, 702 N.E.2d 545, 552 (1998). Section 19(k) penalties are "intended to address situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose." *Id.* at 515, 702 N.E.2d at 553.

¶ 111 With respect to attorney fees, section 16 of the Act provides for an award of attorney fees when an award of additional compensation under section 19(k) is appropriate. 820 ILCS 305/16 (West 2006). The imposition of penalties and attorney fees under sections 19(k) and section 16 is discretionary. *McMahan*, 183 Ill. 2d at 515, 702 N.E.2d at 553.

¶ 112 A review of the Commission's decision concerning penalties and attorney fees pursuant to sections 19(k) and 16 involves a two-part analysis. First, we must determine whether the Commission's finding that the facts justified section 19(k) penalties and section 16 attorney fees is "contrary to the manifest weight of the evidence." *Id*. at 516, 702 N.E.2d at 553. Second, we must determine whether it was an abuse of discretion to award such penalties and fees. *Id*.

¶ 113 Under the facts outlined above, we cannot conclude that the Commission's denial of an award of penalties and attorney fees under sections 19(k), 19(*l*), and 16 was improper. When the employer relies on responsible medical opinion or when there are conflicting medical opinions, penalties are not usually imposed. *Avon Products, Inc. v. Industrial Comm'n*, 82 Ill. 2d 297, 302, 412 N.E.2d 468, 470 (1980). In the present case, the Commission found that the employer had a legitimate dispute concerning whether the claimant could stand for more than two hours without his leg becoming swollen and

painful. Although the Commission's finding in favor of the employer on this issue is against the manifest weight of the evidence, the employer's litigation of this issue does not meet the standard for unreasonable delay under section 19(*l*) or the higher standard of bad faith for awarding penalties and fees under sections 16 and 19(k). Accordingly, the Commission properly denied the claimant's request for penalties and fees.

¶ 114 CONCLUSION

¶ 115 For the foregoing reasons, we reverse that portion of the judgment of the circuit court confirming the Commission's decision with respect to PPD benefits, TTD and maintenance benefits, and vocational rehabilitation services; reverse the Commission's decision with respect to those issues; remand the case to the Commission with directions to reinstate the arbitrator's decision with respect to those issues; and affirm that part of the judgment of the circuit court confirming the Commission's decision with respect to its award for medical expenses and its denial of the claimant's request for penalties and fees under sections 19(k), 19(*l*), and 16 of the Act.

¶ 116 Affirmed in part, reversed in part, and remanded with directions.